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IN THE

Supreme Court of the United States

October Term, 1944

No. 1186.

MADEIRENSE DO BRASIL, S/A,

Petitioner,

against

STULMAN-EMRICK LUMBER CO.

PETITION FOR WRIT OF CERTIORARI

ALBERT M. PARKER,
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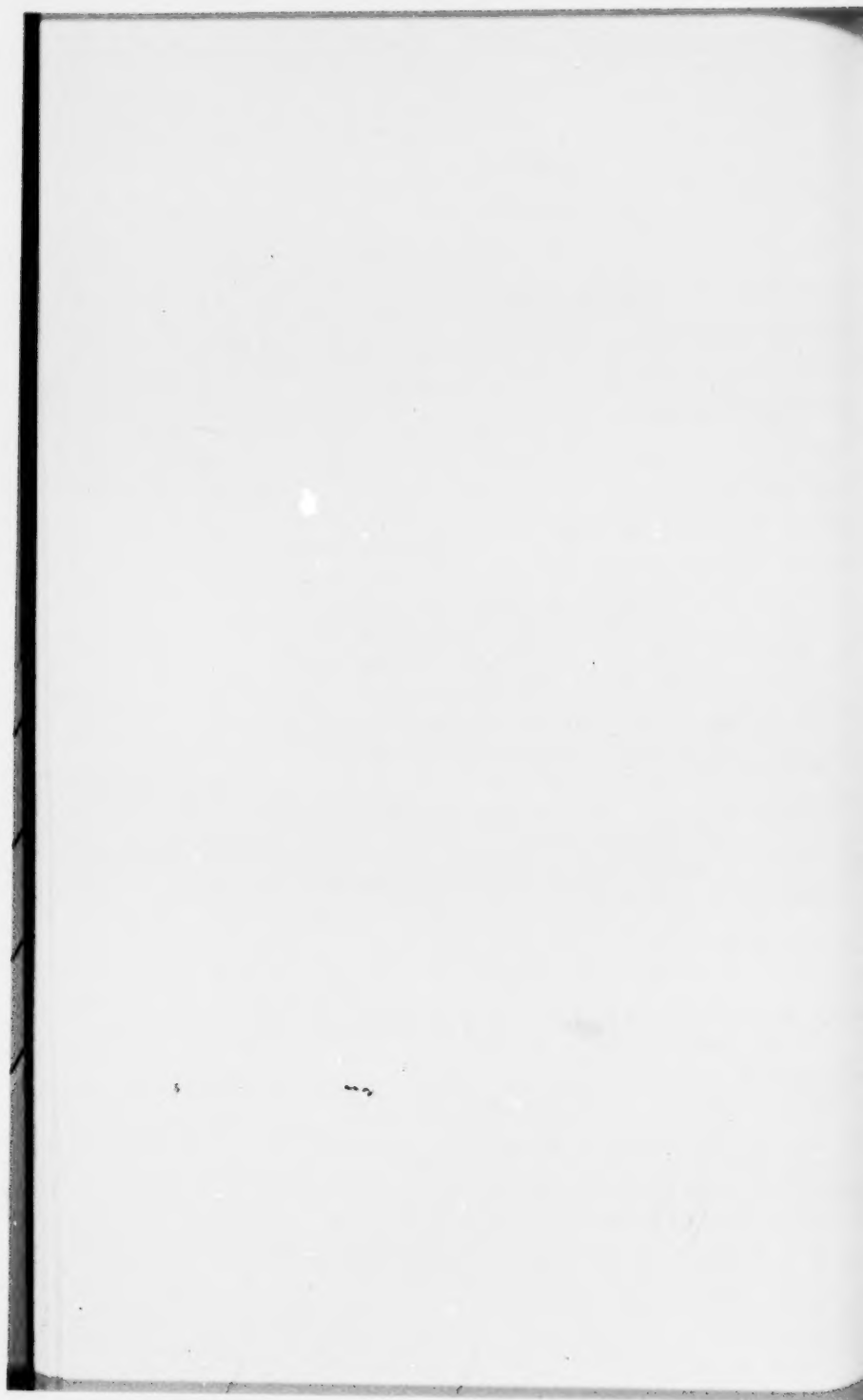


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The petitioner, Madeirense do Brasil, S/A, prays for a writ of certiorari to review the decree of the Circuit Court of Appeals for the Second Circuit, entered on the 29th day of January, 1945, affirming a judgment of the United States District Court, Southern District of New York, which granted a motion for summary judgment against petitioner for the sum of \$5,057.34, representing damages claimed by Stulman-Emrick Lumber Co., for breach of a contract for the sale of lumber by petitioner to said company, together with interest and the costs of action; and which denied petitioner's motion for summary judgment for the sum of \$1,078.98, representing the balance of the agreed price of lumber sold and delivered by petitioner to said Stulman-Emrick Co. (R., 179-181).

The United States District Court, Southern District of New York, rendered its original opinion on December 20, 1943, and a supplemental opinion, after reargument, on

February 7, 1944. The opinions of the District Court are unreported, but are set forth in the Record, at pages 149 to 154, both inclusive, and at pages 170 and 171. The majority opinion of the Circuit Court of Appeals, and a dissenting opinion by Judge Jerome M. Frank are unreported, but are set forth in the Record at pages 185 to 202.

Jurisdiction

The decree of the Circuit Court of Appeals was rendered on the 29th day of January 1945 (R. 203). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

Questions Presented

1. May a United States District Court Judge dispose of disputed issues of damages, on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, where the affidavits submitted on such motion contain statements which permit of more than one inference with respect to one of the principal factors underlying the computation of damages; and where a jury would be at liberty to disbelieve the evidence forming the basis of the decision, and such evidence would not require a directed verdict for the moving party; and where, if the counterclaim had not been contested, such District Judge would have been required by Rule 55 (b) (2) of said Rules to call a jury on the issue of damages?

2. May a District Court Judge deny a plaintiff's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, for a balance of the agreed price of goods sold and delivered by such plaintiff to the defendant, where such balance is admittedly due to such plaintiff in the amount claimed, and where the defendant

makes a cross-motion for summary judgment under said rule, and such District Judge grants such cross-motion of such defendant, as the result of the assumption by such District Judge of powers beyond those vested in such District Judge, under said Rule?

3. May a seller of goods who receives an order for goods from a third party which acts as the intermediary between the buyer and the seller, be bound by the terms of a different order given by the buyer to the intermediary, but never communicated to the seller by such intermediary?

4. Where an order for lumber calls for shipment of such lumber by boat, but contains no specifications as to whether the shipment of such lumber should be made below deck, or on deck, is the obligation of the seller to arrange for such shipment discharged by a tender of such goods to the carrier for shipment on deck?

Statement

In October and November of 1940, the petitioner agreed to sell to the respondent 500,000 square feet of Brazilian pine lumber to be shipped from Brazil to the Port of New York (R., 64).

In November of 1940, the petitioner agreed to sell to respondent, an additional 250,000 feet of Brazilian lumber to be shipped from Brazil to the Port of New York (R., 74).

The contracts, designated Order No. 2042 and Order No. 2049, respectively, for both sales were specifically designated C. and F. contracts (R., 42 and 72); and the respondent agreed that it would obtain and pay for on its own account, insurance to protect both shipments (R., 113, 116, 120, 126 and 128). Neither contract com-

municated to petitioner contained any requirement that the lumber be shipped below deck. Payment for the lumber was provided to be made by respondent as follows:

90% of the F. O. B. value of the lumber at the mill in Brazil, by means of a letter of credit to be issued prior to shipment of the lumber; and 10% of such value to be paid to petitioner within ten days following the arrival of the lumber at New York (R., 42, 43, 72, 113, 116, 126 and 128).

The agreed price for both lots of lumber were as follows:

The first lot of 500,000 feet

<i>Kiln Dried</i>	<i>Naturally Dried</i>
140,000 feet at \$40.00 per 1,000 feet (R., 74).	360,000 feet at \$38.00 per 1,000 feet

The second lot of 250,000 feet

All *naturally dried* at \$40.00 per 1,000 feet
(R., 74).

The above prices included estimated freight charges, which respondent agreed to pay for the account of petitioner (R., 43, 72 and 115). In the case of the first lot of 500,000 feet of lumber, the estimated freight charge at the time the order was placed was \$12.00 per 1,000 feet (R. 43). Accordingly, petitioner's price, based on the estimated freight charge, was \$28.00 per 1,000 feet for that part of the lot of 500,000 feet which consisted of kiln dried lumber; and \$26.00 per 1,000 feet for that part of such shipment which consisted of naturally dried lumber. Both of these prices were exclusive of the freight charges, but the estimated freight charge of \$12.00 per 1,000 feet was added in fixing the gross prices of \$40.00 per 1,000 feet for kiln dried lumber and \$38.00 per 1,000 feet for natural or air dried lumber.

At the time the order for the additional lot of 250,000 feet was made, the freight rate had increased from \$12.00 per 1,000 feet to \$14.16 per 1,000 feet (R., 61); and it was agreed that the petitioner's price for that lot, which consisted entirely of naturally dried lumber, should be, exclusive of the freight charges, the same, that is, \$26.00 per 1,000 feet, as petitioner's price for the naturally dried lumber contained in the first lot, but that respondent should pay the increased estimated freight rate of \$14.16 per 1,000 feet (R., 72). Accordingly, the price of the lot of 250,000 feet was fixed at \$40.00 per 1,000 feet.

The contracts were negotiated by Brazilian Minerals and Timbers Corp., which acted as intermediary between the parties. The only compensation to such intermediary was a commission of 10% of the F. O. B. value of the lumber which respondent agreed to pay (R., 114, 117, 127 and 128).

Neither contract provided which party should bear the cost of any increase in the freight rate, over and above the rate estimated at the times the contracts were made, and that question was left open. The contracts recited a single price to cover the petitioner's price and the estimated freight rate, and that price was an entire price only in the sense that it included an estimate of freight charges.

When the first lot of 500,000 feet of lumber was shipped, the freight rate had increased from \$12.00 per 1,000 feet to \$16.99 per 1,000 feet (R., 80). Petitioner requested that respondent pay the increased freight, without any diminution in the price of \$28.00 per 1,000 feet for kiln dried lumber and \$26.00 per 1,000 feet for naturally dried lumber, to be paid to petitioner. Respondent refused to absorb the increase of \$4.99 per 1,000 feet in the freight rate, and in paying for the shipment of the first lot of 500,000 feet deducted the increased freight rate from the amount paid to petitioner, thereby diminishing the amount paid to petitioner by \$4.99 per 1,000 feet. The

total amount thus deducted from the amount paid by respondent to petitioner for the shipment of 500,000 feet was \$2,490.00.

In addition to making such deduction, respondent refused to pay to petitioner the amount of \$1,078.98, representing the 10% balance due to petitioner on the shipment of the first lot of 500,000 feet, after deducting the increased freight rate paid by respondent. This refusal was based on the non-delivery by petitioner of the additional lot of 250,000 feet of lumber. Respondent claimed that it had been damaged by petitioner's failure to make the additional shipment, and that the said sum of \$1,078.98 would be applied by respondent to its damages.

The second lot of 250,000 feet was never shipped to respondent. However, petitioner tendered delivery of the second lot to a carrier for shipment to respondent above deck, but respondent, relying on its orders Nos. 2271 and 2330, sent to the intermediary but never communicated to petitioner (R., 116, 117, 128 and 129), took the position that the lumber had to be shipped below deck (R., 84). As a result, the lumber was never placed on shipboard, and no other shipping arrangements were available. Accordingly, petitioner treated the contract for the second lot as having been cancelled (R., 86).

This action was instituted by petitioner to recover from respondent the aforesaid amount of \$2,490.00 representing the additional freight charges on the shipment of the first lot of 500,000 feet of lumber, deducted by respondent from the amount payable to petitioner; and for the sum of \$1,078.98, representing the 10% balance due to petitioner on such shipment (R., 3, 4 and 5). Brazilian Minerals and Timbers Corp., the intermediary, was named as a defendant originally, but the suit against it was thereafter dismissed on petitioner's motion.

The respondent interposed a counter-claim for damages for petitioner's failure to ship the additional lot of 250,000 feet of lumber (R., 10-13).

The respondent then moved for summary judgment on its counter-claim, and for summary judgment dismissing petitioner's complaint (R., 102 and 103). Petitioner made a cross-motion for judgment for the relief demanded in the complaint, and dismissing respondent's counterclaim (R., 148).

The Courts below have held as follows:

With respect to the first lot of 500,000 feet of lumber:

1. That the prices for the lumber comprising the first lot of 500,000 feet were entire prices which included freight charges agreed upon by the parties (R., 153); and that the respondent was not liable for any increase in the freight rate, and was entitled to deduct from the purchase price the increased freight rates paid by it. Accordingly, petitioner's claim for \$2,490.00, representing increased freight rates which petitioner contended should be borne by respondent was rejected.

2. That the respondent was entitled to offset the balance of 10% due on this shipment, amounting to \$1,078.98, against damages suffered by it as the result of petitioner's failure to deliver the additional lot of 250,000 feet of lumber (R., 171).

It should be noted that the balance of 10% due on this shipment, in the amount of \$1,078.98, was admittedly due by respondent to petitioner. Respondent conceded that fact; and the lower courts have recognized and accepted it as a fact.

With respect to the second lot of 250,000 feet of lumber:

1. That the petitioner had breached the contract relating to that lot of lumber (R., 153).

2. That respondent was entitled to damages amounting to \$5,282.50, against which should be offset the 10% balance due petitioner on the first shipment, in the amount of \$1,078.98, resulting in a balance of damages due to respondent of \$4,253.52, plus interest thereon from the 31st day of January, 1941 (R., 171).

The total of the judgment rendered in respondent's favor was \$5,057.34, which amount included the costs of action.

The formula used by the District Court and approved by the Circuit Court of Appeals in computing respondent's damages was as follows:

F.O.B. price in Brazil, stated by petitioner in letter dated January 9, 1941—(R., 86)	
250,000 feet at \$28.00 per 1,000 feet.....	\$ 7,000.00
Freight rate quoted by Lloyd Brasiliro Steamship Co., as stated in the same letter—(R., 86)	
250,000 feet at \$33.13 per 1,000 feet.....	8,282.50
	<hr/> \$15,282.50
Less agreed contract price of 250,000 feet at \$40.00 per 1,000 feet (including estimated freight charges of \$14.00 per 1,000').....	10,000.00
	<hr/> \$ 5,282.50
Total damages	1,078.98
Less offset	<hr/>
Balance of damages due respondent (R., 154)	\$ 4,203.52

Specifications of Error

The Court below erred in summarily disposing of the disputed issues of damage, on respondent's motion for summary judgment, in direct violation of the specific wording of Rule 56 of the Rules of Civil Procedure, and in direct violation of the controlling decision of this Court in

Sartor, et al. v. Arkansas Natural Gas Co., 321 U. S. 620, and in spite of evidence in the record contrary to respondent's claim.

The Court below erred in failing to grant summary judgment to petitioner for an amount which respondent admitted was due from it to petitioner.

The Court below erred in holding that petitioner was obligated under the contract for 250,000 feet of lumber to ship such lumber below deck, and that its failure to do so was a breach of the contract; because such contract contained no requirement that the lumber be shipped below deck.

Reasons for Granting Writ

1. The Circuit Court of Appeals has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings, by affirming the decision of a lower court granting a motion for summary judgment, although the lower court exercised powers denied to it by the Federal Rules of Civil Procedure; as the result of which petitioner has been unjustly mulcted in damages, and has been unjustly deprived of damages to which it is entitled; and a precedent improperly magnifying the power of a District Judge has been created. Accordingly, the action of the Circuit Court of Appeals calls for the exercise of this Court's power of supervision.

2. The Circuit Court of Appeals has decided important questions of law in a way probably in conflict with applicable decisions of this Court.

3. The Circuit Court of Appeals has decided important questions of law in a way probably untenable and in conflict with the weight of authority.

Respectfully submitted,

ALBERT M. PARKER,
Counsel for Petitioner.